

May 22, 2002

MEMORANDUM

SUBJECT: Final Model Order Under Sections 311 (c) and (e) of the Clean Water Act

FROM: Barry Breen, Director /s/
Office of Site Remediation Enforcement

TO: Addressees (See Below)

We are pleased to issue the final version of the "Revised Model Order Under Sections 311 (c) and (e) of the Clean Water Act." It is our hope that this model be used as an effective tool for the issuance of administrative orders for the cleanup and prevention of discharges and threatened discharges of oil and hazardous substances into navigable waters, adjoining shorelines, and certain other areas.

An additional tool to be used along with this model would be the "Final Guidance on the Issuance of Administrative Orders Under Section 311 (c) and (e) of the Clean Water Act," issued by our office on July 1, 1997.

We would like to thank all EPA staff who assisted in the development of this model. We encourage the Regions to incorporate use of this model into their enforcement programs.

If you have any questions about this model, please contact Carolyn Lane-Wenner of the Regional Support Division at (202) 564-5129.

Attachment

cc: Regional Counsel, Regions I-X
Office of Environmental Stewardship Director, Region I
Office of Site Remediation & Restoration Director, Region I
Emergency & Remedial Response Division Director, Region II
Hazardous Waste Management Division Director, Region III
Waste Management Division Director, Region IV
Waste, Pesticides & Toxics Division Director, Region V
Superfund Division Director, Region VI
Compliance Assurance & Enforcement Division Director, Region VI
Water, Wetlands & Pesticides Division Director, Region VII
cc: Superfund Division Director, Region VII

Office of Enforcement, Compliance & Environmental Justice Director, Region VIII
Office of Ecosystems Protection & Remediation, Region VIII
Water Division Director, Region IX
Office of Environmental Cleanup Director, Region X
Regional OPA Primary Enforcement Contacts
Estelle Bulka, OECA/OSRE/PPED
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Steven Baer, DOJ
Andy Gordon, OGC

**MODEL ADMINISTRATIVE ORDER FOR REMOVAL
ACTIVITIES UNDER THE CLEAN WATER ACT
§ 311(c) AND (e)**

DATE: May 22, 2002

This document is solely intended as guidance. It does not establish a binding norm and is not finally determinative of the issues addressed. This document is not intended to be a synopsis of principles of law. The policies and procedures in this guidance do not constitute a rulemaking by the Agency and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person. The Agency may take action at variance with this guidance.

DIRECTIONS

Optional Information/sections/language are contained in brackets []. Notes, annotations and language which require Region specific, or site-specific variation or information are identified in *italics*, *parentheses ()*, and underlined. The regions are encouraged to consult the "Guidance on the Issuance of Administrative Orders under §311(c) and (e) of the Clean Water Act" for additional information.

Office of Site Remediation Enforcement Contact:
Carolyn Lane-Wenner
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION (Number)

IN THE MATTER OF:
(Facility Name)
(City or Town, County, State)

(Name of Respondent(s)),

(If there are multiple
Respondents, reference an
attached list.)

Respondent(s).

DOCKET NO.

UNILATERAL ADMINISTRATIVE
ORDER FOR REMOVAL ACTIVITIES

[Administrative Order on Consent]

Proceeding Under Section
311(c) and (e) of the Federal
Water Pollution Control Act,
as amended, 33 U.S.C. §
1321(c) and (e).

TABLE OF CONTENTS

[For Consent Orders, use the term "Consent Order" wherever "Order appears.]"

[The Table of Contents section is optional.]

I. JURISDICTION AND GENERAL PROVISIONS

1. This Order¹ is issued pursuant to the authority vested in the President of the United States by Section 311 (c) and (e) of the Federal Water Pollution Control Act, 33 U.S.C. §1321(c) and (e), as amended ("CWA"). This authority has been delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order No. 12777, 58 Federal Register

¹ Where the Order will require performance of actions that have been commenced voluntarily, a Consent Order should be used.

54757 (October 22, 1991), and further delegated to the Regional Administrators by EPA Delegation Nos. (2-85, 2-89) [and to the (Insert Regional redelegation information)].²

2. This Order pertains to a discharge (a substantial threat of a discharge) of oil (a hazardous substance), which (occurred/is occurring/may occur) at a facility ("facility") located at (address or descriptive location of Facility) in (City or Town, County, State). (If discharge or a substantial threat of a discharge of oil or hazardous substances is occurring/may occur from a vessel, Regions should use the best information reasonably available for the location of the vessel.) This Order requires the Respondent(s) to conduct removal actions described herein to abate or mitigate an imminent and substantial threat to the public health or welfare of the United States that may be presented by the actual or substantial threat of a discharge of oil or hazardous substances from Respondent'(s') vessel or facility into navigable waters, adjoining shoreline or exclusive economic zone.

3. EPA has notified the (State or Commonwealth of (State)) of this action pursuant to Section 311 (e)(1)(B) of CWA, 33 U.S.C. § 1321(e)(1)(B).

[Consensual Language:

4. Respondent(s) consents to issuance of the Order. Respondent(s)'s participation in this Order shall not constitute an admission of liability. Respondent(s) does not admit and

² This Order may be issued in conjunction with other Order authorities. Where appropriate, please reference appropriate delegation numbers and regional redelegation language for those statutes.

retains the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Order, the validity of EPA's Findings of Fact or Conclusions of Law.]

This Order is also based on Section 1002 of the OPA, 33 U.S.C. §2702, for reimbursement of costs.

[- Consent Orders -

1. This Order applies to and is binding upon Respondent(s) and Respondent's(s') heirs, successors and assigns. [Note: If none of the Respondents are natural persons, delete "heirs" from this list.] Any change in ownership or corporate status of Respondent(s) including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondent(s) responsibilities under this Order. (If the Order is issued to more than one Respondent, add the following: "Respondents are jointly and severally liable for carrying out all activities required by this Order. Compliance or noncompliance by one or more Respondents with any provision of this Order shall not excuse or justify noncompliance by any other Respondents.")]

II. PARTIES BOUND

1. This Order applies to and is binding upon Respondent(s) and Respondent's(s') heirs, [directors, officers, employees, agents, receivers, trustees,] successors and assigns.³ Any change in ownership or corporate status of Respondent(s) including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondent's responsibilities under this Order. (If the Order is issued to more than one Respondent, add the following: "Respondents are jointly and severally liable for carrying out all activities required by this Order. Compliance

³ If none of the Respondents are natural persons, delete "heirs" from this list. If you have evidence that a Respondent's directors, officers, employees agents, receivers, or trustees have significant decision-making authority, control over the day -to-day activities of the facility, or other similar involvements, add them to the list.

or noncompliance by one or more Respondents with any provision of this Order shall not excuse or justify noncompliance by any other Respondent'(s').")

2. Respondent(s) shall ensure that (*its/their*) contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent(s) shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

(The Definitions section will differ according to the specifics of each action. Regions should include definitions for technical terms and terms of art, e.g., absorbed phase plume, dissolved phase plume, free phase plume, vapor phase plume, etc. The definitions should also be consistent with CWA, and the National Oil and Hazardous Substances Pollution Contingency Plan, as amended 40 C.F.R. Part 300. Finally, the Definition section should include the following boilerplate definitions.)

1. Unless otherwise expressly provided herein, terms used in this Order which are defined in Section 311 of the Clean Water Act (CWA), or in the Oil Pollution Act (OPA) shall have the meaning assigned to them in CWA or OPA. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

2. "Area of Concern" shall mean any area of the Facility under the control or ownership of the owner or operator where a release to the environment of a hazardous substance or oil has occurred,

is suspected to have occurred, or may occur, regardless of the frequency or duration of release.⁴

3. "Act of God" shall have the definition set out in Section 1001(1) of OPA, 33 U.S.C. § 2701(1).

4. "CWA" shall mean the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act, 33 U.S.C. §§ 1251 et seq.

5. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

6. "Discharge" shall have the meaning set forth in §311(a)(2) of the CWA, 33 U.S.C. §1321(a)(2), and 40 CFR Part 110.1 for purposes of the work to be performed under this Order, and shall have the meaning set forth in Section 1001(7) of OPA, 33 U.S.C. §2701(7), for purposes of reimbursement of cost.

7. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or successor agencies of the United States.

8. "Exclusive economic zone" or "EEZ" shall mean the zone established by Presidential Proclamation Number 5030, dated March 10, 1983, including the ocean waters of the areas referred to as

⁴ OPA-90 does not define "site" and it may be difficult to tie it to the "Facility" definition which is written to meet FRP requirements. This definition may not cover adjoining shorelines, etc.

"eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990.

9. "Facility" shall mean the (_____), encompassing approximately (____) acres, located at (address or description of location) in (name of city), (____) County, (name of state/commonwealth) and depicted generally on the map attached as Appendix _____. The facility shall also have the meaning as set forth in Section 311(a)(10) and (a)(11) of the CWA, 33 U.S.C. §1321(a)(10) and (a)(11), and by Section 1001(22) and (24) of OPA, 33 U.S.C. § 2701(22) and (24).

10. "Hazardous Substance" shall mean any substance defined in section 311(a)(14) of the Clean Water Act 33 U.S.C. § 1321(a)(14).

11. "National Contingency Plan or NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.

12. "Navigable water" shall have the meaning set forth in Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and Section 1001(21) of OPA, 33 U.S.C. § 2701(21), and 40 CFR Part 110.

13. "Order" shall mean this Unilateral Administrative Order **[substitute "Administrative Order on Consent or Consent Order" if appropriate]** and all appendices attached hereto. In the event of conflict between this Order and any Appendix, this Order shall control.

14. "OPA" shall mean the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.
15. "Oil" shall have the meaning set forth in Section 311(a)(1) of the CWA, 33 U.S.C. §1321(a)(1), for the purposes of the work to be performed under this Order, and Section 1001(23) of OPA, 33 U.S.C. § 2701(23), for purposes of reimbursement of costs.
16. "Paragraph" shall mean a portion of the Order identified by an Arabic numeral or an uppercase letter.
17. "Section" shall mean a portion of this Order identified by a roman numeral.
18. "State" and "Town" or other local government shall mean (_____).
19. "Statement of Work or SOW" shall mean the statement of work for implementation of the removal activities and any modifications made in accordance with Section XII (Modification) of this Order.
20. "United States and State" shall mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States.
21. "Vessel" shall mean every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.

22. "Work" shall mean all activities Respondent(s) is/are required to perform under this Order, except those required by Section VI (Record Retention).

IV. FINDINGS OF FACT

1. (Because Findings of Fact are facility-specific, no model language is provided. Facts should be presented concisely, accurately, and logically. They should support the finding that there may be an imminent and substantial threat to public health or welfare of the United States, including fish, shellfish, etc. (see CWA § 311(e)(1)).⁵ The facts should also outline the basis for naming Respondent(s). Regions should include a discussion of the following points: identification of Respondent(s); evidence that Respondent(s) is an owner and/or operator and/or person in charge of the facility⁶; facility location and description; facility history and operations; facility ownership; general categories of Respondent'(s') liability; conditions and data showing discharges that exist, e.g., exposure routes, risk assessment, affected populations, environmental harm, potential for fire or explosion, and other dangers. Regions should provide a brief description of the removal action being ordered and why it is necessary to protect the public health or welfare of the United States.)

⁵ Section 311(e)(1) provides for **actual or threatened discharge** of oil or a hazardous substance from a vessel or facility in violation of subsection (b) of this section.

⁶ If the Respondent is not one of these parties (i.e., a party listed in §311(b)(7)(A)), the Order should indicate why it is being issued to this party (e.g., need to access the site of a discharge through its property).

V. CONCLUSIONS OF LAW AND DETERMINATIONS

1. Based on the Findings of Fact set forth above, EPA has determined that: (XXXXX) is a ("vessel/onshore facility/offshore facility") as defined in Sections 311(a)(3), (10) and (11) of CWA, 33 U.S.C. § 1321(a), and by Section 1001(24) of OPA, 33 U.S.C. §2701(24).
2. Each Respondent(s) is an "owner or operator" as defined by Section 311(a)(6) of CWA, 33 U.S.C. § 1321(a)(6), Section 1001(26) of OPA. (Respondent(s) (is)(are) also a "responsible party(ies)" as defined by OPA §1001(32)), 33 U.S.C. §2701(26). [Omit if issued to a party who does not meet these definitions (e.g., order issued to obtain access only.)]
3. Each Respondent(s) (is) a "person" as defined by Section 311(a)(7) of CWA, 33 U.S.C. § 1321(a)(7), and by Section 1001(27) of OPA, 33 U.S.C. §2701(27).
4. The incident described in the Statement of Facts is a "discharge" (presents a substantial threat of a "discharge") as defined in Section 311(a)(2) of CWA, 33 U.S.C. § 1321, and 40 CFR Part 110.1 and Section 1001(7) of OPA, 33 U.S.C § 2701(7).
5. The "discharge"⁷ (or substantial threat of a "discharge") is:

(i) into or on the navigable water; (ii) on the adjoining shorelines to a navigable water; (iii) into or on the waters of the exclusive economic zone; or, (iv) may affect natural

⁷ The body of water in which the discharge occurred (or is threatening to occur) should be clearly identified, including name and location **if available** (e.g., latitude, longitude and mile marker).

resources belonging to, appertaining to, or under the exclusive management authority of the United States.

6. The quantity of oil or hazardous substances discharged (which may be discharged) from the (vessel/facility) is a harmful quantity within the meaning of Section 311(b)(3) of CWA, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. §110.3(b), because the discharge (a substantial threat of a discharge) caused (may cause) a violation of applicable water quality standards (and/or) caused (may cause) a film or sheen upon or a discoloration of the surface of the water or adjoining shorelines (and/or) caused (may cause) a sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines.

7. The discharge (threat of a discharge) is a violation of Section 311(b) of CWA, 33 U.S.C. §1321(b), and Section 1001 of OPA, 33 U.S.C. §2701(7), because a harmful quantity of oil or hazardous substances has been discharged (may be discharged) from the (vessel/onshore facility/offshore facility):

(i) into or upon the navigable waters of the United States, adjoining shorelines, or
into or upon the waters of the contiguous zone; or

(ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. §1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. §1501 et seq.]; or,

(iii) which may affect natural resources belonging to, appertaining to; or

(iv) under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. §1801 et seq.]).

8. The discharge (substantial threat of a discharge) has caused (may cause) an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, wildlife, public and private property, shorelines, beaches, habitat, and/or other living and nonliving natural resources under the jurisdiction or control of the United States.

9. The removal actions required by this Order are necessary to protect the public health and welfare of the United States of America, including fish, shellfish, wildlife, public and private property, shorelines, beaches, habitat, and other living and/or nonliving natural resources under the jurisdiction or control of the United States. Further, these measures are necessary to ensure effective and immediate removal of a discharge [mitigation or prevention of a substantial threat of a discharge] of oil [a hazardous substance] in the EEZ, into or on the navigable waters, on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

10. The removal actions required by this Order are in accordance with the NCP and are authorized by EPA pursuant to the authority granted in Section 311(c) and 311(e) of CWA, 33 U.S.C. § 1321(c) and 1321(e), as delegated by the President in Executive Order 12777, Section 2(b)(1), 56 FR 54757 (October 22, 1991).

11. Under Section 1002(b)(1) of OPA, 33 U.S.C. §2702(b)(1), and CWA Section 311(f), 33 U.S.C. §1321(f) Respondent(s) is liable to the United States for all removal costs incurred by the United States in connection with discharge or the threatened discharge of oil [hazardous substance] from the facility or vessel.

12. A "removal," as defined in Section 311(a)(8) of the CWA, 33 U.S.C. §1321(a)(8) and Section 1001(30) of OPA, 33 U.S.C. §2701(30), is necessary at the Facility to minimize and mitigate damage to the public health or welfare.

VI. ORDER

1. Based upon the Findings of Fact and Conclusions of Law and Determinations set forth above, EPA hereby orders **[and Respondent(s) agrees if Consent Order]** that Respondent(s) shall comply with all requirements of this Order and shall perform the following actions:

A. Notice of Intent to Comply

Each Respondent shall notify EPA in writing within X days after the Effective Date of this Order of Respondent(s) intent to comply with this Order. Failure of any Respondent to provide such notification within this time period shall be a violation of this Order by such Respondent.

B. Work to Be Performed

Respondent(s) shall perform, at a minimum, the following removal action:

(This section should provide a description of the work to be performed with sufficient detail to permit Respondent(s) to draft a Work Plan. Items that the Work Plan could include: fire protection; provisions for containment of run off and proper disposal of oil and/or hazardous substances; appropriate sampling methods; investigation of suspect areas (lagoons, septic systems, etc.); investigation, definition and remediation of groundwater contamination at the facility, etc.).

2.1 Designation of Contractor, Project Coordinator, and On-Scene Coordinator

A. Respondent(s) shall perform the removal action itself (themselves) or retain (a) contractor(s) to perform the removal action. If Respondent(s) elects to perform the work they shall notify EPA of the names and qualifications of such personnel within (XXX) working days. If Respondent(s) elect to retain (a) contractor(s), Respondent(s) shall notify EPA of the name(s) and qualification(s) of such contractor(s) within (XXX) working days after the effective date of this Order. EPA retains the right to disapprove the selection of any, or all, of the contractors and/or subcontractors retained by the Respondent(s), or of Respondent'(s') choice of itself (themselves) to conduct the removal action. If EPA disapproves the selection of a contractor, Respondent(s) shall retain a different contractor or notify EPA that it will perform the removal action itself within (XXX) working days following EPA's disapproval of Respondent's selection and shall notify EPA of that contractor's name or

Respondent'(s') name and qualifications within (XXX) working days of EPA's disapproval.

B. Within (XXX) working days after the effective date of this Order, the Respondent(s) shall designate an individual as a Project Coordinator who shall be responsible for administration of all the Respondent'(s') actions required by the Order. Respondent(s) shall submit the designated coordinator's name, address, telephone number, and qualifications to EPA. To the extent possible, the Project Coordinator shall be present at the facility or readily available during work at the facility. EPA retains the right to disapprove the selection of any Project Coordinator named by the Respondent(s). If EPA disapproves the selection of a Project Coordinator, Respondent(s) shall retain a different Project Coordinator and shall notify EPA of that person's name and qualifications within (XXX) working days following EPA's disapproval. Receipt by Respondent'(s') Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by all Respondent(s).

C. EPA has designated _____ of the _____ as its On-Scene Coordinator (OSC). Respondent(s) shall direct all submissions and notifications required by this Order to the OSC at (OSC's address) **[Note: Regions may specify method of delivery, e.g., by certified mail, express mail, or other delivery methods].**

D. EPA and Respondent(s) shall have the right to change their designated OSC or Project Coordinator, respectively. EPA

shall notify the Respondent(s), and Respondent(s) shall notify EPA promptly, before such a change is made. Notification may initially be made orally but shall be followed promptly by written notice.

2.2 Work Plan and Implementation

A. Within (XXX) days after the effective date of this Order, the Respondent(s) shall submit to EPA for approval a draft Work Plan for performing the removal action set forth above. The draft Work Plan shall provide a description of, and an expeditious schedule for, the action required by this Order.

B. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan. If EPA requires revisions, Respondent(s) shall submit a revised draft Work Plan within (XXX) days of receipt of EPA's notification of the required revisions. Respondent(s) shall implement the Work Plan as finally approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be deemed to be incorporated into this Order and fully enforceable under this Order. Respondent(s) shall notify EPA at least 48 hours prior to performing any on-site work pursuant to the EPA-approved Work Plan. Respondent(s) shall not commence or undertake any removal actions at the facility without prior EPA approval.

[Option: Regions may specify formal standards for work quality and quality of deliverables.]

2.3 Health and Safety Plan

A. Within (XXX) days after the effective date of this Order, the Respondent(s) shall submit for EPA review and comment a Health and Safety Plan that ensures the protection of human health and safety during performance of on-site and off-site work under this Order. This plan shall be prepared in accordance with the applicable portions of EPA's Standard Operating Safety Guide, (November 1984, updated 1988 and 1992, NTIS Publication No. PB92-963414). In addition, the plan shall comply with all current applicable Occupational Safety and Health Administration (OSHA) regulations, including but not limited to Hazardous Waste Operations and Emergency Response Standards (29 CFR Part 1910), Construction Standards (29 CFR Part 1926), General Industry Standards (29 CFR Part 1910), and the general duty requirement of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.). Respondent(s) shall incorporate all changes to the plan requested by EPA and implement the plan during the removal action.

2.4 Quality Assurance and Sampling

[Consent Order: EPA shall give Respondent(s) advance notice of such activity so that it may take split and/or duplicate samples.]

A. Respondent(s) shall develop a plan for quality assurance/quality control ("QA/QC"), data validation, and chain

of custody procedures regarding all sampling and analyses performed pursuant to this Order. Respondent(s) (shall/will) submit such plan to EPA for its approval.

B. Upon request by EPA, Respondent(s) shall have a qualified laboratory, as determined by EPA, analyze samples submitted by EPA for quality assurance monitoring. Respondent(s) shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

C. Upon request by EPA, Respondent(s) shall allow EPA or its authorized representative(s) to take split and/or duplicate samples of any samples collected by Respondent(s) or their contractors or agents while performing work under this Order. Respondent(s) shall notify EPA not less than (3) working days in advance of any sample collection activity. EPA shall have the right to take any additional samples that it deems necessary.

[Consent Orders:

EPA shall give the parties advance notice of such activity so that they may take split and/or duplicative sample.]

[2.5 Post-Removal Facility Control

A. In accordance with the Work Plan schedule, or as otherwise directed by EPA, the Respondent(s) shall submit a proposal for post-removal facility control, consistent with Section 300.415(1) of the NCP, 40 CFR 300.415(1), and OSWER Directive 9360.2-02 (NTIS Publication No. PB91-921326). Upon EPA

approval, Respondent(s) shall implement such controls and shall provide EPA with documentation of all post-removal facility control arrangements.]

2.6 Reporting

A. Respondent(s) shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every (Xth) day after the date of receipt of EPA's approval of the Work Plan until termination of this Order, unless otherwise directed in writing by EPA. These reports shall describe all significant developments during the preceding period, including work performed and any problems encountered, analytical data received during the reporting period, and developments anticipated during the next reporting period, including a schedule of work to be performed, anticipated problems, and planned resolutions of past or anticipated problems. The OSC may request weekly (or more frequent) reports when the activities at the site warrant a higher reporting frequency.

(The frequency and content of these reports may be determined on a facility-specific basis.)

2.7 Final Report

A. Within (XXX) working days after completion of construction and implementation of the removal actions required under this Order, the Respondent(s) shall submit for EPA review (and approval) a final report summarizing the actions taken to comply with this Order. The final report shall include at a minimum, a listing of quantities and types of materials removed

off-site or handled on-site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destinations of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that under Section 309(c)(4) of the CWA, 33 U.S.C. §1319(c)(4), there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

3. Access to Property and Information

A. Respondent(s) shall provide and/or obtain access to the Facility and off-site areas to which access is necessary to implement this Order; Respondent(s) shall also provide access to all records and documentation related to the conditions at the Facility and the actions conducted pursuant to this Order. Such access shall be provided to EPA employees, employees of the Natural Resources Trustee Agencies, the Coast Guard (USCG), their contractors, agents, consultants, designees, representatives, and State of (name) representatives. These individuals shall be permitted to move freely at the Facility and appropriate off-site areas in order to conduct actions which EPA or the State determines to be necessary. Respondent(s) shall submit to EPA,

(upon receipt/upon request), the results of all sampling or tests and all other data generated by Respondent(s) or their contractor(s), or on the Respondent'(s') behalf during implementation of this Order.

B. Where work under this Order is to be performed in areas owned by or in the possession of a person other than Respondent(s). Respondent(s) shall use (its/their) best efforts to obtain all necessary access agreements within (XXX) days after the effective date of this Order, or as otherwise specified in writing by EPA. Respondent(s) shall immediately notify EPA if after using (its/their) best efforts (it is/they are) unable to obtain such agreements. Respondent(s) shall describe in writing (its/their) effort(s) to obtain access. EPA may then assist Respondent(s) in gaining access, to the extent necessary to effectuate the removal actions described herein, using such means as EPA deems appropriate. EPA reserves the right to seek reimbursement from Respondent(s) for all costs and attorney's fees incurred by the United States in obtaining access for Respondent(s).

4. Record Retention, Documentation and Availability of Information

A. Respondent(s) shall preserve all documents and information relating to work performed under this Order, or relating to the oil or hazardous substances found on or discharged from the Facility, for *six years* following completion of the removal actions required by this Order. At the end of

this six-year period and 60 days before any document or information is destroyed, Respondent(s) shall notify EPA that such documents and information are available to EPA for inspection, and upon request, shall provide the originals or copies of such documents and information to EPA. In addition, Respondent(s) shall provide documents and information retained under this Section at any time before expiration of the six-year period upon the written request of EPA. **[Note: Please include the name and title of the EPA official who will receive the documents.]**

B. Respondent(s) may assert a business confidentiality claim pursuant to 40 C.F.R. § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Order, provided such claim is allowed by Section 308(b)(2) of CWA, 33 U.S.C. § 1318(b)(2). EPA shall only disclose information covered by a business confidentiality claim to the extent permitted by, and by means of the procedures set forth at 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Respondent(s).

C. Respondent(s) may assert that certain documents, records and other information requested are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent(s) assert such a privilege in lieu of providing documents, they shall provide EPA with the following:

- (1) the title of the document, record, or information;
- (2) the date of the document, record, or information;
- (3) the name and title of the author of the document, record, or information;
- (4) the name and title of each addressee and recipient;
- (5) a description of the contents of the document, record, or information; and
- (6) the privilege asserted by Respondent(s).

However, no documents, reports or other information created or generated pursuant to the requirements of the Order shall be withheld on the grounds that they are privileged.

5. Off-Facility Shipments

A. Respondent(s) shall, prior to any off-Facility shipment of oil or hazardous substances, oil- or hazardous substances-contaminated soil, or oil- or hazardous substances-contaminated water, provide written notification of such shipment to the appropriate state (Commonwealth) environmental official and to EPA. The notification shall include:

- (a) the name and location of the facility to which the oil, hazardous substances, soil or water, will be shipped;
- (b) the type and quantity of the oil, hazardous substances, soil or water to be shipped;
- (c) the expected schedule for the shipment of the oil, hazardous substances, soil or water; and

(d) the transporter and method of transportation of the shipment of oil, hazardous substances, soil or water. Respondent(s) shall also notify EPA and the appropriate State environmental official of major changes in the shipment plan, such as a decision to ship the oil, hazardous substances, soil or water to another facility.

B. All off-Facility shipments of oil or hazardous substances, oil or hazardous substances-contaminated soil, and oil or hazardous substances-contaminated water shall be transported, stored, and disposed of in accordance with all applicable U.S. Department of Transportation regulations, the NCP, and all other applicable Federal, State, and local laws and regulations. **[Note: Remove reporting to the State if the State is a potentially responsible party.]**

6. Compliance With Other Laws

A. Respondent(s) shall perform all actions required pursuant to this Order in accordance with all applicable Federal, state, and local laws and regulations. Where any portion of the work requires a Federal or state permit or approval, Respondent(s) shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Order is not, and shall not be construed to be, a permit issued pursuant to any Federal or state law or regulation.

7. **Emergency Response and Notification of Discharges**

A. If any incident, or change in facility conditions, during the actions conducted pursuant to this Order causes or may cause a substantial threat of a discharge or an additional discharge of oil or hazardous substances from the facility or a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the Respondent(s) shall immediately take all appropriate action. The Respondent(s) shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to the Health and Safety Plan, in order to prevent, abate or minimize such discharge or substantial threat of a discharge. Respondent(s) shall also immediately notify the OSC or, in the event of his/her unavailability, shall notify the Regional Duty Officer (Appropriate Regional Office -, e.g., Emergency Planning and Response Branch, EPA Region, telephone number, and the EPA Regional Emergency 24-hour telephone number) of the incident or facility conditions. If Respondent(s) fails to respond, EPA may respond to the discharge or threatened discharge and seek recovery of its costs of response work under Section IX. Respondent(s) shall take such action in consultation with the OSC, unless it is not possible for the Respondent(s) to contact the OSC prior to the time the action becomes necessary.

B. In addition, in the event of any discharge of oil or a hazardous substance, Respondent(s) shall immediately notify the National Response Center at telephone number (800) 424-8802. Respondent(s) shall submit a written report to EPA within (seven (7)) days after each discharge, setting forth the events that occurred and the measures taken or to be taken to mitigate and prevent the recurrence of such a discharge. This reporting requirement is in addition to, not in lieu of, reporting under Section 311(b)(5) of CWA and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § § 11001 et. seq., if applicable, or under any other Federal, State, or local laws.

VII. AUTHORITY OF THE EPA ON-SCENE COORDINATOR

[Note: Regions should include other EPA personnel who may be responsible for long-term remediation cleanups. Also, Regions should consult their delegation manual to determine if an OSC has authority to carry out this Order.]

1. The OSC is authorized to oversee the proper and complete implementation of this Order, including the authority to:

- (i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;
- (ii) direct or monitor all Federal, State, and private actions to remove a discharge;
- (iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available; and

(iv) determine when the removal is complete.

Absence of the OSC from the facility shall not be cause for stoppage of work unless specifically directed by the OSC.

VIII. ENFORCEMENT: PENALTIES FOR NONCOMPLIANCE

1. Violation of any provision of this Order may subject Respondent(s) to civil penalties of up to twenty-seven thousand five hundred dollars (\$27,500) per day of violation, or an amount up to three (3) times the cost incurred by the United States, as provided in Section 311(b)(7)(B) of CWA, 33 U.S.C. § 1321(b)(7)(B), as adjusted by 61 *FR* 69360 (December 31, 1996) (to be codified at 40 CFR 19.4).

[Administrative Orders on Consent Language

IX. REIMBURSEMENT OF OVERSIGHT COSTS

1. The U.S. will submit to Respondent(s) a bill(s) and accounting(s) of removal costs incurred by the United States. Removal costs consist of all costs, including indirect costs, incurred by the U.S., its employees, agents, contractors, consultants and other authorized and/or designated representatives in connection with U.S. oversight, monitoring, obtaining access, and performing emergency response and/or performance of the Work plan.

2. Respondent shall, within thirty (30) calendar days of receipt of a bill(s) and accounting(s), remit a certified or cashier's check for the amount of those costs made payable to the

United States of America, or make such payments via electronic transfer, as directed by the U.S. Checks shall reference the facility name and FPN (096003) and be sent to:

Commander
National Pollution Funds Center
Ballston Common Office Building, Suite 1000
4200 Wilson Boulevard
Arlington, VA 22203
FPN 096003

3. In the event that the payment(s) required by this Order *is/are* not made by the 30th day following the date of receipt of the bill and accounting by the responsible party or guarantor, Respondent(s) shall pay interest on the unpaid balance at the rate established by Section 1005(b)(4) of OPA. Payments made under this Paragraph shall be in addition to such other remedies or sanctions as are available to the United States by virtue of Respondent'(s') failure to make timely payments under this Order, including by not limited to the sanctions set forth in Section 311(b)(7)(B) of CWA, 33 U.S.C. §1321(b)(7)(B).]

X. RESERVATION OF RIGHTS

1. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health or welfare of the United States, or to prevent, abate, or minimize an actual or substantial threat of a discharge of oil, hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, from or outside of the

facility. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring the Respondent(s) in the future to perform additional activities pursuant to CWA or any other applicable law. The United States reserves the right to bring an action against Respondent(s) under Section 311(f) of CWA, 33 U.S.C. §1321(f), and/or Sections 1002 and 1015 of Oil Pollution Act, 33 U.S.C. §§ 2702 and 2715, for recovery of any costs incurred by the United States related to this Order and not reimbursed by Respondent(s). Response costs shall include, but are not limited to, past costs, direct costs, indirect costs, costs of monitoring, and accrued interest as provided in Section 311(f) of CWA, 33 U.S.C. §1321(f), and §1005 of OPA, 33 U.S.C. Section 2705.

2. Notwithstanding any other provision of this Order, at any time during the response action, EPA reserves the right to perform its own studies, complete the removal action (or any portion of the removal action), and seek reimbursement from Respondent(s) for its costs, or seek any other appropriate relief.

3. Nothing in this Order shall preclude EPA from taking any additional enforcement actions, including modification of this Order or issuance of additional Orders, and/or additional response actions as EPA may deem necessary, or from requiring Respondent(s) in the future to perform additional activities

pursuant to the Resource Conservation and Recovery Act (RCRA) as amended by the Hazardous and Solid Waste Act (HSWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Clean Water Act (CWA), the Oil Pollution Act (OPA), or any other applicable law.

4. Pursuant to Section 311(c) and (e) of the Clean Water Act, 33 U.S.C. § 1321(c) and (e), EPA and its agents are authorized to enter the property owned by the Respondent(s), located at (facility address, county and state) and to perform the activities necessary to assess the source, nature and extent of the discharge or threatened discharge at the facility and to remove the discharge or to prevent threatened discharges of oil or hazardous substances. Notwithstanding any provision of this Order, the United States hereby reserves all of its information-gathering, inspection and all enforcement authorities and rights under all applicable statutes and regulations. The United States expressly reserves all rights it has to issue additional Orders or to take any other action it deems necessary to protect the public health or welfare of the United States.

5. Notwithstanding any provision of this Order, EPA reserves the right to assess an administrative penalty pursuant to Section 311(b)(6) of CWA, 33 U.S.C. § 1321(b)(6), and/or to seek a civil penalty pursuant to Section 311(b)(7), 33 U.S.C. §1321(b)(7).

6. Nothing in this Order shall limit the authorities of the On-Scene Coordinator as outlined in the NCP.

7. If a court issues an Order that invalidates any provision of this Order or finds that Respondent(s) has (have) sufficient cause not to comply with one or more provisions of this Order, Respondent(s) shall remain bound to comply with all provisions of this Order not invalidated by such court's Order.

XI. OTHER CLAIMS

1. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent(s). The United States or EPA shall not be deemed a party to any contract entered into by the Respondent(s) or (its/their) directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

2. Nothing in this Order shall constitute a satisfaction of or discharge from any claim or cause of action against the Respondent(s) or any person, for any liability such person may have under CWA, OPA, other statutes, or the common law, including but not limited to any claims of the United States for penalties, costs, damages, and interest. **(Note: Only a Natural Resource Trustee has the authority to waive a claim for natural resource damage.)**

XII. MODIFICATIONS

1. Modifications to any plan or schedule (or the attached EPA Statement of Work) required by this Order, may be made in writing by the OSC or at the OSC's oral direction. If the OSC

makes an oral modification, it will be memorialized in writing within (XXX) working days, provided, however, that the effective date of the modification shall be the date of the OSC's oral direction. Modifications to any portion of the Order, other than plans or schedules, may only be made in writing under signature of (title of EPA official issuing order).

2. If Respondent(s) seek(s) permission to deviate from any approved plan or schedule (or Statement of Work), Respondent's(s') Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis.

3. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by the Respondent'(s') shall relieve the Respondent(s) of (its/their) obligation(s) to obtain such formal approval as may be required by this Order, and to comply with all requirements of this Order unless it is formally modified.

XIII. NOTICE OF COMPLETION

1. When EPA determines, after EPA's review of the Final Report, that all removal actions have been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, (Regions should provide a list of continuing obligations) EPA will provide written notice to the Respondent(s). If EPA determines that any removal actions have not been completed in accordance with this Order, EPA will notify the Respondent(s) in writing, provide a list of the

deficiencies, and require that Respondent(s) modify the Work Plan to correct such deficiencies. The Respondent(s) shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent(s) to implement the approved modified Work Plan shall be a violation of this Order.

XIV. ADDITIONAL REMOVAL ACTIONS

[Note: This section is optional.]

[Option: If EPA determines that additional removal actions not included in an approved plan are necessary to protect the public health or welfare of the United States, EPA will notify Respondent(s) of that determination. Unless otherwise stated by EPA, within (thirty (30)) days of receipt of notice from EPA that additional removal actions are necessary to protect public health or welfare of the United States, Respondent(s) shall submit for approval by EPA a Work Plan for the additional removal actions. The plan shall conform to the applicable requirements of sections (XXXXX) of this Order. Upon EPA's approval of the plan pursuant to Section VI.2.2-Work Plan and Implementation, Respondent(s) shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This section does not alter or diminish the OSC's authority to make oral or written modifications to any plan or schedule pursuant to Section XII.]

[XV. ACT OF GOD ⁸

[This section should only be used in a Consent Order.]

1. Respondent(s) agrees to perform all requirements under this Order within the time limits established, unless the performance is delayed by an Act of God. For purposes of this Order, an Act of God is defined as an "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care and foresight." Thus, bad weather, such as seasonal hurricanes, or earthquakes in areas where earthquakes are common, probably will not constitute an Act of God defense. The following are not recognized as an Act of God: financial inability to complete work or increased cost of performance.

2. Respondent(s) shall notify EPA orally within 24 hours after Respondent(s) becomes aware of any event that Respondent(s) contends constitutes an Act of God and in writing within 5 days after the event. Such notice shall: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay, including necessary demobilization and remobilization; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures.

⁸ OPA Section 1003 (a) Complete Defense states in part: "A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by (1) an act of God; (2) an act of war; an act of omission of a third party, other than an employee or agent of the responsible party...."

Respondent(s) shall take all reasonable measures to avoid and minimize the delay. Failure to comply with the notice provision of this Section shall be grounds for EPA to deny Respondent(s) an extension of time for performance. Respondent(s) shall have the burden of demonstrating that the event is an Act of God, that the delay is warranted under the circumstances, and that best efforts were exercised to avoid or mitigate the effects of the delay.

3. If EPA determines that a delay in performance of a requirement under this Order is or was attributable to an Act of God, the time period for performance of that requirement shall be extended as deemed necessary by EPA. Such an extension shall not alter Respondent'(s') obligation to perform or complete other tasks required by the Order which are not directly affected by the Act of God.

Note: OPA Section 1003 (a) states in part: "A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by (1) an act of God; (2) an act of war; an act of omission of a third party, other than an employee or agent of the responsible party...."]

XVI. EFFECTIVE DATE

1. This Order shall be effective (XXX) days after the Order is signed by the Regional Administrator or person to whom delegated.

XVII. SIGNATORIES

[[Language for Consent Order]

A. Each undersigned representative of a signatory to this Administrative Order on Consent certifies that he or she is fully authorized to enter into the terms and conditions of this Order and to bind such signatory, to this document.

In the matter of (facility's name, docket number).

BY:

Date:

(Facility's name, etc.)]

IT IS SO ORDERED

BY: _____

DATE: _____

Name

Regional Administrator (or person to whom delegated)

Region (Number)

U.S. Environmental Protection Agency

EFFECTIVE DATE: _____